

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAURA DE LA TORRE,
Plaintiff,

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security
Administration,
Defendant.

Case No. CV 13-7159-SP

MEMORANDUM OPINION AND
ORDER

I.

INTRODUCTION

On October 4, 2013, plaintiff Laura De La Torre filed a complaint against defendant Carolyn Colvin, seeking a review of a denial of Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents three disputed issues for decision: (1) whether the

1 administrative law judge (“ALJ”) properly determined that plaintiff could perform
2 her past relevant work; (2) whether the ALJ properly rejected the opinion of
3 plaintiff’s treating physician Lara Stewart, M.D.; and (3) whether the ALJ properly
4 assessed plaintiff’s credibility. Memorandum in Support of Plaintiff’s Complaint
5 (“P. Mem.”) at 4-14; Defendant’s Memorandum in Support of Answer (“D.
6 Mem.”) at 2-13.

7 Having carefully studied the parties’ written submissions, the
8 Administrative Record (“AR”), and the decision of the ALJ, the court concludes
9 that, as detailed herein, the ALJ properly rejected plaintiff’s subjective complaints.
10 But the court also finds the ALJ improperly rejected the opinion of plaintiff’s
11 treating physician, and that the ALJ’s step four determination is not supported by
12 substantial evidence. Therefore, the court remands this matter to the
13 Commissioner in accordance with the principles and instructions enunciated in
14 this Memorandum Opinion and Order.

15 II.

16 **FACTUAL AND PROCEDURAL BACKGROUND**

17 Plaintiff, who was fifty years old on her alleged disability onset date, has a
18 GED. AR at 63, 106, 145. Her past relevant work includes employment as a
19 cashier. *Id.* at 22, 63, 146, 173.

20 On March 16, 2010, plaintiff filed applications a period of disability, DIB,
21 and SSI alleging an onset date of September 1, 2009, due to a anxiety, panic
22 attacks, arthritis of the spine, and asthma. *Id.* at 104-116, 144. The Commissioner
23 denied plaintiff’s application initially and upon reconsideration, after which she
24 filed a request for a hearing. *Id.* at 82-86.

25 On June 20, 2011, plaintiff, represented by counsel, appeared and testified
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1 at a hearing before the ALJ. *Id.* at 60, 62-79. The ALJ denied benefits on
2 February 13, 2012. *Id.* at 13-23.

3 Applying the well-known five-step sequential evaluation process, the ALJ
4 found, at step one, that plaintiff had not engaged in substantial gainful activity
5 since the alleged onset date of September 1, 2009. *Id.* at 15.

6 At step two, the ALJ found that plaintiff suffered from the following severe
7 impairments: asthma, chronic obstructive pulmonary disorder (“COPD”),
8 osteoarthritis of the lumbar spine, depressive disorder, and anxiety disorder. *Id.* at
9 16.

10 At step three, the ALJ found that plaintiff’s impairments did not meet or
11 medically equal one of the listed impairments set forth in 20 C.F.R. Part 404,
12 Subpart P, Appendix 1. *Id.*

13 The ALJ then assessed plaintiff’s residual functional capacity (“RFC”),¹ and
14 determined that she had the RFC to perform light work, as defined in 20 CFR
15 §§ 404.1567(b) and 416.967(b), except that she should avoid concentrated
16 exposure to pulmonary irritants and her work should be limited to simple,
17 repetitive tasks. *Id.* at 17.

18 The ALJ found, at step four, that plaintiff was able to perform her past
19 relevant work as a cashier. *Id.* at 22. Thus, the ALJ concluded that plaintiff was
20 not suffering from a disability as defined by the Social Security Act. *Id.* at 23.
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23 ¹ Residual functional capacity is what a claimant can do despite existing
24 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152,
25 1155-56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step
26 evaluation, the ALJ must proceed to an intermediate step in which the ALJ
27 assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486
28 F.3d 1149, 1151 n.2 (9th Cir. 2007).

1 Plaintiff filed a timely request for review of the ALJ's decision, which was
2 denied by the Appeals Council. *Id.* at 4-9. The ALJ's decision stands as the final
3 decision of the Commissioner.

4 III.

5 STANDARD OF REVIEW

6 This court is empowered to review decisions by the Commissioner to deny
7 benefits. 42 U.S.C. § 405(g). The findings and decision of the Commissioner
8 must be upheld if they are free of legal error and supported by substantial
9 evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as
10 amended). But if the court determines that the ALJ's findings are based on legal
11 error or are not supported by substantial evidence in the record, the court may
12 reject the findings and set aside the decision to deny benefits. *Aukland v.*
13 *Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
14 1144, 1147 (9th Cir. 2001).

15 "Substantial evidence is more than a mere scintilla, but less than a
16 preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such
17 "relevant evidence which a reasonable person might accept as adequate to support
18 a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276
19 F.3d at 459. To determine whether substantial evidence supports the ALJ's
20 finding, the reviewing court must review the administrative record as a whole,
21 "weighing both the evidence that supports and the evidence that detracts from the
22 [AC's] conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "cannot be
23 affirmed simply by isolating a specific quantum of supporting evidence."
24 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
25 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
26 the ALJ's decision, the reviewing court "may not substitute its judgment for that
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1 of the ALJ.’” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
2 1992)).

3 IV.

4 DISCUSSION

5 A. The ALJ Properly Considered Plaintiff’s Credibility

6 Plaintiff contends that the ALJ failed to properly consider her credibility. P.
7 Mem. at 19-21. Specifically, plaintiff argues that the reasons the ALJ provided for
8 discounting plaintiff’s credibility are not supported by substantial evidence. *Id.* at
9 19-21. The court disagrees.

10 The Commissioner must make specific credibility findings, supported by the
11 record. Social Security Ruling 96-7p. To determine whether testimony
12 concerning symptoms is credible, the Commissioner engages in a two-step
13 analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First,
14 the Commissioner must determine whether a claimant produced objective medical
15 evidence of an underlying impairment ““which could reasonably be expected to
16 produce the pain or other symptoms alleged.”” *Id.* at 1036 (quoting *Bunnell v.*
17 *Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no
18 evidence of malingering, an “ALJ can reject the claimant’s testimony about the
19 severity of her symptoms only by offering specific, clear and convincing reasons
20 for doing so.” *Smolen*, 80 F.3d at 1281; *Benton v. Barnhart*, 331 F.3d 1030, 1040
21 (9th Cir. 2003). The Commissioner may consider several factors in weighing a
22 claimant’s credibility, including: (1) ordinary techniques of credibility evaluation
23 such as a claimant’s reputation for lying; (2) the failure to seek treatment or follow
24 a prescribed course of treatment; and (3) a claimant’s daily activities. *Tommasetti*
25 *v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

1 At the first step, the ALJ found that plaintiff's medically determinable
2 impairments could reasonably be expected to cause the symptoms alleged. AR at
3 18. At the second step, the ALJ was required to provide clear and convincing
4 reasons for discounting plaintiff's credibility. Here, the ALJ discounted plaintiff's
5 credibility because he found that her claimed limitations were not supported by the
6 objective medical evidence, the descriptions of her daily activities, or her work
7 history. *Id.* at 20.

8 The first ground provided by the ALJ for finding plaintiff less credible was
9 the lack of objective medical evidence to substantiate plaintiff's claims and the
10 inconsistencies between the available objective evidence and the claims. *Id.* at 18.
11 An ALJ "may not reject a claimant's subjective complaints based solely on a lack
12 of objective medical evidence to fully corroborate the alleged severity of pain,"
13 but it may be one factor used to evaluate credibility. *Bunnell*, 947 F.2d at 345; *see*
14 *also Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

15 Here, plaintiff claimed at the hearing before the ALJ that she stopped
16 working because of mental health issues. AR at 65, 67-68, 71, 73. Specifically,
17 plaintiff testified that she suffers from panic attacks and forgetfulness. *Id.* at 65,
18 67-68, 71. Plaintiff also indicated in written submissions – including multiple
19 Disability Reports and a Function Report – that she suffers from anxiety and panic
20 attacks, as well as a lack of motivation. *Id.* at 144, 168, 169, 171, 178.

21 The ALJ found plaintiff's claims unsupported by objective medical
22 evidence. *Id.* at 18-19. With respect to plaintiff's assertions that she was unable
23 to sustain the mental demands of competitive employment, the ALJ first noted that
24 she failed to present herself to the Venice Family Clinic for treatment until several
25 months after her alleged onset date, and when she did go to the clinic she admitted
26 that she had not taken her medication for several months, due to losing her
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1 insurance. *Id.* at 18. As plaintiff asserts, a claimant's failure to seek treatment due
2 to inability to pay cannot support an adverse credibility determination. *Orn v.*
3 *Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). Thus, this portion of the ALJ's
4 reasoning is not clear and convincing, although there is some question as to
5 whether the ALJ was correct that loss of insurance led to her lapse in medication
6 and treatment, since the clinic notes reflect (and plaintiff testified) that plaintiff's
7 care was transferred to the Venice Family Clinic when she lost her insurance. *See*
8 AR at 66, 304.

9 In any event, the remainder of the ALJ's description of plaintiff's mental
10 health treatment history does support the ALJ's adverse credibility decision. The
11 ALJ found that although plaintiff had a history of mental health treatment, for
12 approximately 18 years she had been "fairly stable" on her regimen, and that
13 situational stressors – such as caring for her disabled brother and separating from
14 her abusive husband – existed. AR at 18. Further, the ALJ observed that plaintiff
15 exhibited an "ok" affect with linear, goal directed thought processes, good
16 intellect, and fair insight/judgment. *Id.* The ALJ observed that while progress
17 notes from the remainder of 2010 indicated breakthrough depression leading to
18 anxiety symptoms, that these were apparently related to her "suffering from
19 stressors with her husband." *Id.*; *see id.* at 301. He noted that plaintiff
20 experienced dysphoric mood in November 2010; however, he observed that
21 "mental status examination was relatively unremarkable." *Id.* at 18. The ALJ
22 further noted that though plaintiff returned to the clinic throughout 2011 for
23 physical complaints, the record was "void of any further specific mental health
24 treatment after January 2011." *Id.* The ALJ observed that in July 2010, plaintiff
25 reported occasional panic attacks to William Goldsmith, M.D., but Dr. Goldsmith
26 observed only a slightly anxious mood, full affect, clear speech, organized thought
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1 processes, normal thought content, orientation, intact memory and concentration,
2 above average intelligence, and adequate insight and judgment. *Id.* at 19, 223-24.
3 The ALJ noted that after that evaluation, there were no reported instances of panic
4 attacks. *Id.* at 19.

5 In terms of physical limitations, plaintiff alleged an inability to work due to
6 arthritis and asthma. *Id.* at 144. She complained of pain on the right side of her
7 body and limited strength, which included difficulty lifting. 166, 170, 178.
8 Plaintiff also reported difficulty bending and kneeling. *Id.* at 170.

9 The ALJ noted that with respect to plaintiff's allegations regarding physical
10 limitations, the record revealed that her asthma was largely controlled with
11 medication. *Id.* at 19. Regarding lumbar spine pain reported in August 2010, the
12 ALJ noted that the record reflected that "physical examinations were relatively
13 unremarkable with negative straight leg raising, full range of motion, and
14 tenderness to palpation." *Id.*; *see id.* at 284. Plaintiff reported radiating lower
15 back pain into the right buttocks with a physical examination showing decreased
16 reflexes in the right lower extremity; however, she was given a prescription for
17 muscle relaxers and "the record is void of any musculoskeletal complaints for
18 almost 5 months." AR at 19. In July 2010, plaintiff reported radiating lower back
19 and neck pain exacerbated by standing; however Soheila Benrazavi, M.D.,
20 observed only tenderness in the lower lumbar region, negative straight leg raising,
21 full range of motion with pain only at the extremes, and full range of motion in all
22 upper and lower extremities. *See* AR at 214. She had normal motor function,
23 normal sensation, was able to ambulate without the need for an assistive device,
24 stand on heels and toes, and perform tandem gait. *Id.* at 19, 213. The court thus
25 finds the ALJ presented a clear and convincing reason to discount plaintiff's
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1 claims of pain and limitations and to determine that plaintiff's claims lack support
2 from objective medical evidence.

3 The ALJ gave a further clear and convincing reason in stating that
4 plaintiff's daily activities were not consistent with the alleged degree of pain and
5 impairment. *See* AR at 20. For example, the ALJ referenced a Third Party
6 Function Report completed in July 2010 reflecting that plaintiff was able to care
7 for her disabled older brother, including preparing meals, doing errands, taking
8 him to doctor's appointments, and meeting with his case manager. *Id.* at 20, 157-
9 164. The ALJ further noted that plaintiff had no difficulties with personal care,
10 preparing meals, driving, walking, using public transportation, shopping for
11 clothes and groceries, handling money, reading, writing, and doing household
12 chores such as laundry, cleaning, and ironing. *Id.* She was able to attend family
13 events and church on a weekly basis, had no difficulty getting along with others,
14 was able to pay attention for an hour, follow written and spoken instructions, get
15 along with authority figures, and handle stress and changes. *Id.* at 20, 157-161,
16 163. In addition, the ALJ separately referenced plaintiff's report to Dr. Goldsmith
17 that she assisted her brother with his activities of daily living, did housework,
18 cooking, and cleaning, and was planning to return to school. *Id.* at 19, 223, 224.

19 Finally, the ALJ compared plaintiff's work history with her testimony,
20 noting that although plaintiff's post-onset work activity did not constitute
21 disqualifying substantial gainful activity, it nevertheless indicated that at times her
22 daily activities and physical abilities were "considerably greater than alleged." *Id.*
23 In 2010, plaintiff earned \$8,755 which was "apparently self-employment
24 earnings." *Id.* The ALJ observed that plaintiff "proved that she is capable of
25 engaging in work activity by actually doing the same in employment for an
26 extended period of months." *Id.* Further, the ALJ noted that plaintiff had been
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1 “treated by a mental healthcare provider for approximately 20 years and was noted
2 to be stable and working throughout that period.” *Id.* He also observed that “[t]he
3 fact that the impairments did not prevent the claimant from working at that time
4 strongly suggests that it would not currently prevent work.” *Id.* He noted that in a
5 Function Report, plaintiff stated that she was able to pay attention for 2-3 hours.
6 AR at 170. The ALJ concluded that “[w]hile the claimant’s reported abilities and
7 activities do not alone establish her ability to perform the range of work [identified
8 in the RFC], in combination with the paucity of clinical findings and overall lack
9 of treatment, they do indicate her degree of limitation has been overstated.” *Id.* at
10 20.

11 Plaintiff argues that the ALJ had a duty to inquire into her 2010 earnings
12 because the record of her post-onset work is not clear, as evidenced by the ALJ’s
13 statement that the \$8,755 was “apparently” self-employment income. P. Mem. at
14 13. Specifically, plaintiff contends that “[o]nce a perceived inconsistency between
15 the written record and [] oral testimony arises, the ALJ must confront the claimant
16 with the inconsistency and if an explanation is made address that explanation.” P.
17 Mem. at 13. In support of her position she cites two immigration cases: *Shah v.*
18 *INS*, 220 F.3d 1062 (9th Cir. 2000) and *Soto-Olarte v. Holder*, 555 F.3d 1089,
19 1092 (9th Cir. 2009). Neither of these cases supports plaintiff’s contention. Both
20 stand for the proposition that an immigration judge cannot base an adverse
21 credibility determination on an inconsistency without addressing the applicant’s
22 explanation thoroughly. *Shah*, 220 F.3d at 1068; *Soto-Olarte*, 555 F.3d at 1091-
23 92. Plaintiff fails to demonstrate the applicability of this rule to the Social
24 Security context and the court thus rejects this argument. *See, e.g., Palomo v.*
25 *Colvin*, 2014 WL 4929040, at *7 n.6 (C.D. Cal. Oct. 1, 2014) (rejecting identical
26 argument and citing similar cases).

1 The three factors considered by the ALJ in evaluating plaintiff's subjective
 2 complaints of pain – lack of objective evidence, activities of daily living, and work
 3 history – were valid, and the ALJ's explanations for his credibility determination
 4 were clear and convincing because the ALJ set forth "findings sufficiently specific
 5 to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's
 6 testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (citing
 7 *Bunnell*, 947 F.2d at 345-46 (9th Cir. 1991)). Accordingly, this court finds the
 8 ALJ properly discounted plaintiff's subjective complaints.

9 **B. The ALJ Failed to Provide Specific and Legitimate Reasons for**
 10 **Rejecting the Opinion of Treating Physician Stewart**

11 Plaintiff contends that the ALJ improperly rejected the opinion of her
 12 treating physician Lara Stewart, M.D. Pl. Mem. at 7-10. Specifically, plaintiff
 13 claims that the ALJ failed to offer specific and legitimate reasons for discounting
 14 this physician's opinions. *Id.* at 17. The court agrees.

15 In determining whether a claimant has a medically determinable
 16 impairment, among the evidence the ALJ considers is medical evidence.
 17 20 C.F.R. § 416.927(b). In evaluating medical opinions, the regulations
 18 distinguish among three types of physicians: (1) treating physicians; (2) examining
 19 physicians; and (3) non-examining physicians. 20 C.F.R. § 416.927(c), (e); *Lester*
 20 *v. Chater*, 81 F.3d 821, 830 (9th Cir.1995) (as amended). "Generally, a treating
 21 physician's opinion carries more weight than an examining physician's, and an
 22 examining physician's opinion carries more weight than a reviewing physician's."
 23 *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001); 20 C.F.R.
 24 § 416.927(c)(1)-(2). The opinion of the treating physician is generally given the
 25 greatest weight because the treating physician is employed to cure and has a
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1 greater opportunity to understand and observe a claimant. *Smolen*, 80 F.3d at
2 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

3 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
4 *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the
5 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
6 81 F.3d at 830. If the treating physician's opinion is contradicted by other
7 opinions, the ALJ must provide specific and legitimate reasons supported by
8 substantial evidence for rejecting it. *Id.* at 830.

9 Dr. Stewart, a specialist in family medicine, reported treating plaintiff every
10 two to three months between February 11, 2010 and March 28, 2011. AR at
11 264, 267. Dr. Stewart completed a Physical Residual Functional Capacity
12 Questionnaire ("RFC Questionnaire") regarding plaintiff's limitations on April 11,
13 2011. *Id.* at 264-267. The RFC Questionnaire reflects Dr. Stewart's diagnosis of
14 De Quervain's tenosynovitis, asthma/COPD, sciatica, arm/hand weakness, and
15 osteopenia. *Id.* at 264. In the RFC Questionnaire, Dr. Stewart indicated the
16 clinical findings and objective signs supporting her diagnosis as follows: an x-ray
17 of plaintiff's hands showing osteoarthritis in her thumbs; positive musculoskeletal
18 findings, and a positive Finkelstein's test. *Id.*

19 Dr. Stewart opined that plaintiff retained the RFC to sit, stand, or walk each
20 for a total of 4 hours in an 8-hour workday, but can stand for no more than two
21 hours at a time; frequently lift up to 20 pounds; occasionally climb ladders and
22 stairs; and never stoop or crouch. *Id.* at 266. Additionally, Dr. Stewart noted
23 plaintiff's limited ability to do "repetitive reaching, handling or fingering" and the
24 likelihood that plaintiff would miss more than four days of work a month. *Id.* at
25 266-267.

1 The ALJ found that certain aspects of Dr. Stewart's opinion "are in fact
2 consistent with the residual functional capacity determined in this decision and
3 given significant weight," but the ALJ afforded "no weight to the upper extremity
4 limitations" or to the indication that plaintiff would miss more than four workdays
5 every month. *Id.* at 21. The ALJ gave four reasons for rejecting these limitations:
6 (1) plaintiff has not sought treatment since April 2011; (2) Dr. Stewart's progress
7 notes do not support her opinion that plaintiff would regularly miss work; (3)
8 plaintiff's daily activities are inconsistent with these limitations; and (4) Dr.
9 Stewart's assessments rely heavily on plaintiff's subjective reports, whereas the
10 ALJ found plaintiff not credible in that regard. *Id.* Plaintiff challenges the
11 sufficiency of the first reason, again citing her inability to afford treatment. But as
12 defendant notes, plaintiff lost her MediCal coverage in 2009 and still obtained
13 treatment thereafter. *See, e.g.*, AR at 66-67, 195-307. Thus, the ALJ gave specific
14 and legitimate reasons for rejecting the extremity and missed work limitations
15 opined by Dr. Stewart.

16 But the ALJ failed to explain why he omitted from plaintiff's RFC Dr.
17 Stewart's limitations vis-à-vis sitting, standing, and walking. *Compare id.* at 266
18 *with id.* at 21. The ALJ's failure to include these limitations in plaintiff's RFC
19 constitutes an implicit rejection of this part of Dr. Stewart's opinion. *See Smolen*,
20 80 F.3d at 1286 ("By disregarding [plaintiff's treating physicians'] opinions and
21 making contrary findings, [the ALJ] effectively rejected them."). Yet the ALJ
22 failed to provide any reason, let alone a specific and legitimate one, for rejecting
23 those findings. *See, generally, id.* at 21. Accordingly, the ALJ erred in rejecting
24 this portion of Dr. Stewart's opinion. *See Lester*, 81 F.3d at 830 ("Even if the
25 treating doctor's opinion is contradicted by another doctor, the Commissioner may
26 not reject this opinion without providing 'specific and legitimate reasons'
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1 supported by substantial evidence in the record for so doing.”) (internal quotation
2 marks and citation omitted).

3 This error was not harmless. Plaintiff points out that the portion of Dr.
4 Stewart’s opinion dealing with her sitting, standing, and walking limitations
5 impacts whether she can perform her past relevant work as a cashier. P. Mem. at
6 9. This work is generally performed at the light exertional level which involves a
7 great deal of standing and walking. P. Ex. 1; SSR 83-10. “Relatively few
8 unskilled light jobs are performed in a seated position.” SSR 83-10. “The full
9 range of light work requires standing or walking, off and on, for a total of
10 approximately 6 hours of an 8-hour workday. Sitting may occur intermittently
11 during the remaining time.” *Id.* Dr. Stewart’s sitting, standing, and walking
12 restrictions preclude the ability to perform the cashier’s job at the light level.

13 Accordingly, this matter must be remanded to allow the ALJ to consider this
14 portion of Dr. Stewart’s opinion and either incorporate it into plaintiff’s RFC or
15 provide specific and legitimate reasons for rejecting it.

16 **C. The ALJ’s Past Relevant Work Determination Conflicts with the RFC**

17 Plaintiff argues the ALJ erred at step four in determining she can perform
18 her past relevant work as a cashier because the reasoning component of the
19 General Education Development (“GED”) requirements for that job, as defined in
20 the U.S. Department of Labor’s Dictionary of Occupational Titles, (“DOT”), (4th
21 ed. 1991), conflicts with the ALJ’s RFC assessment limiting her to simple,
22 repetitive tasks. P. Mem. at 4-6. The court agrees.

23 Each DOT job description includes GED scales for reasoning, language, and
24 mathematics, which are “aspects of education (formal and informal) which are
25 required of the worker for satisfactory job performance.” DOT, Appendix C,
26 Section III. To determine a job’s simplicity and the reasoning level required, one
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1 should look to the GED reasoning level ratings for the job listed in the DOT.
2 *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 983 (C.D. Cal. 2005). A job’s reasoning
3 level “gauges the minimal ability a worker needs to complete the job’s tasks
4 themselves.” *Id.* The DOT provides that a cashier II requires GED reasoning
5 level 3 work. P. Mem. at 5; Ex. 1. Reasoning level 3 work requires the ability to
6 “[a]pply commonsense understanding to carry out instructions furnished in
7 written, oral, or diagrammatic form [and] [d]eal with problems involving several
8 concrete variables in or from standardized situations.” Ex. 1.

9 There is a split among the circuit courts as to whether the limitation to
10 simple tasks is compatible with a reasoning level of three. *Compare Terry v.*
11 *Astrue*, 580 F.3d 471, 478 (7th Cir. 2009) (a claimant limited to “simple” work
12 could perform a reasoning level three job); *Renfrow v. Astrue*, 496 F.3d 918, 920-
13 21 (8th Cir. 2007) (a claimant with an inability to do “complex technical work”
14 was not precluded from unskilled jobs with a reasoning level of three), and
15 *Hackett v. Barnhart*, 395 F.3d 1168, 1176 (10th Cir. 2005) (limitation to simple
16 and routine tasks is inconsistent with level-three reasoning). The Ninth Circuit
17 has not addressed this issue, but among its district courts that have, they have
18 consistently held that a limitation to simple, repetitive tasks is consistent with
19 reasoning level two jobs but incompatible with reasoning level three jobs. *See*
20 *Grimes v. Astrue*, 2011 WL 164537, at *4 (C.D. Cal. Jan. 18, 2011) (stating that
21 “[n]umerous district courts in this Circuit have held that a limitation to simple,
22 repetitive tasks is inconsistent with Reasoning Level 3 jobs” and citing cases).

23 This court agrees that reasoning level 3 and, consequently, the cashier II job
24 as defined in the DOT, are at odds with the ALJ’s RFC assessment limiting her to
25 simple, repetitive tasks. The DOT “raises a presumption as to the job
26 classification” requirements. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th
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1 Cir.1995). “[A]n ALJ may rely on expert testimony which contradicts the DOT,
2 but only insofar as the record contains persuasive evidence to support the
3 deviation.” *Id.* In this case, there was no vocational expert testimony provided at
4 the hearing. Rather, the ALJ relied upon a Vocational Assessment performed on
5 August 3, 2010 finding that plaintiff was able to perform her past work as a
6 cashier. AR at 22. The ALJ did not discuss in his opinion the variance between
7 the reasoning level required for the cashier job and his limitation of plaintiff to
8 “simple, repetitive tasks.” *Id.* at 17. The ALJ thus erred in his step four
9 determination, as it is unsupported by substantial evidence. *See Smolen*, 80 F.3d
10 at 1279.

11 **V.**

12 **REMAND IS APPROPRIATE**

13 The decision whether to remand for further proceedings or reverse and
14 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
15 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this
16 discretion to direct an immediate award of benefits where: “(1) the record has been
17 fully developed and further administrative proceedings would serve no useful
18 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
19 evidence, whether claimant testimony or medical opinions; and (3) if the
20 improperly discredited evidence were credited as true, the ALJ would be required
21 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020
22 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
23 instructions to calculate and award benefits). But where there are outstanding
24 issues that must be resolved before a determination can be made, or it is not clear
25 from the record that the ALJ would be required to find a plaintiff disabled if all the
26 evidence were properly evaluated, remand for further proceedings is appropriate.

1 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
2 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for
3 further proceedings when, even though all conditions of the credit-as-true rule are
4 satisfied, an evaluation of the record as a whole creates serious doubt that a
5 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

6 Here, as set out above, remand is required because the ALJ failed to
7 properly evaluate Dr. Stewart’s opinion concerning sitting, standing, and walking
8 limitations, and failed to account for the assessed RFC’s mental limitations when
9 determining, at step four, that plaintiff could perform her past work as a cashier.
10 The record has not been fully developed on these points, particularly as to the step
11 four error. On remand, the ALJ shall: (1) reconsider the opinion provided by Dr.
12 Stewart regarding plaintiff’s physical limitations with regard to standing, sitting,
13 and walking and either credit the opinion or provide specific and legitimate
14 reasons supported by substantial evidence for rejecting it; (2) clarify his RFC
15 determination if need be, based on his reconsideration of Dr. Stewart’s opinion;
16 and (3) to the extent necessary, retain a vocational expert to determine whether
17 plaintiff is capable of performing her past relevant work. If not, the ALJ shall then
18 proceed to step five of the sequential analysis to determine what work, if any,
19 plaintiff is capable of performing.

VI.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered REVERSING the decision of the Commissioner denying benefits, and REMANDING the matter to the Commissioner for further administrative action consistent with this decision.

DATED: December 9, 2014

A handwritten signature in black ink, appearing to read 'SHERI PYM', written over a horizontal line.

SHERI PYM
United States Magistrate Judge